(6) No. 95-1086

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

EMILY DISTAJO, et al.,

Petitioners,

v.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether 9 U.S.C. § 4 confers subject matter jurisdiction of petitions to compel arbitration upon United States District Courts which do not, and could not, have subject matter jurisdiction of the underlying state court lawsuits raising the issues to be arbitrated.

(2) Whether Illinois law permits relitigation of the enforceability and validity of the arbitration clauses while post-trial motions and/or appeals are pending from the prior nine Illinois trial court final judgments holding the arbitration clauses void and unenforceable.

(3) Whether North Carolina law permits relitigation of the enforceability and validity of the arbitration clause while DAI appeals the prior North Carolina state trial court orders denying DAI's motion to stay

under 9 U.S.C. § 3 and denying DAI's motion to dismiss based upon the contention that the arbitration clause required arbitration as a condition precedent to litigation.

(4) Whether the rule of *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) required the Federal Courts to abstain from exercising subject matter jurisdiction of the petitions to compel arbitration, in view of the prior nine Illinois, one Alabama, and one North Carolina state trial court judgments holding the arbitration clauses void and unenforceable.

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REPLY POINTS

(1) The Illinois Supreme Court has recently, clearly, confirmed that the Doctrine of Res Judicata applies to bar parties from re-litigating claims and issues decided by a trial court judgment, before appellate review has been exhausted, thereby requiring the federal courts to give full faith and credit to the prior, nine, Illinois trial court judgments holding the arbitration clauses void and unenforceable.

Petitioners submit that *Relph v. Board of Education*, 84 Ill. 2d 436, 420 N.E. 2d 147 (Ill. 1981) and *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 499 N.E. 2d 1373 (Ill. 1986) are factually distinguishable and did not reverse or overrule *Harding Company v. Harding*, 352 Ill. 417, 426[4], 186 N.E. 152 (Ill. 1933), which holds:

"The doctrine of res judicata is,

> that a cause of action finally determined between the parties on the merits, by a court of competent jurisdiction, cannot again be litigated by new proceedings before the same or any other tribunal, *except as the judgment or decree may be brought before a court of appellate jurisdiction for review* in the manner provided by law." (Emphasis added).

Petitioners' argument is set forth more fully at Pages A-78-85 of the Appendix of Respondent, DAI.

DAI argues to this court that the Illinois Supreme Court's October 31, 1995 Order (DAI Appendix at A-93) denying Petitioners' September 29, 1995 (DAI Appendix at A-91) Motion for a Supervisory Order under Illinois Supreme Court Rule 383 (DAI Appendix at A-66-92) indicates that the Illinois Supreme Court agrees with DAI's interpretation of Illinois law on the issues of res judicata and preclusion.

That argument is incorrect.

Supervisory orders under Illinois Supreme Court Rule 383 are addressed to the discretion of the Court. The denial of a Motion for a Supervisory Order has no precedential value.

Since denying the Petition for a Supervisory Order on October 31, 1995 (DAI Appendix at Page A-93), the Illinois Supreme Court has cited *Harding Co. v. Harding*, 352 Ill. 417, 186 N.E. 152 (Ill. 1933) with approval, *Herzog v. Lexington Township*, 167 Ill. 2d 288, 657 N.E. 2d 926, 930 [2] (Ill. 1995), and has specifically ruled, on March 21, 1996, that a trial court judgment operates as a final judgment on the merits for purposes of res judicata, notwithstanding a subsequent appeal. See *Rein v. Noyes and Co.*, Illinois Supreme Court Case No. 79168, March 21, 1996 slip opinion at Page 8:

> "Therefore, under Rule 273, the trial judge's decision to grant defendants' Motion to Dismiss the Rescission counts in *Rein I* based on the applicable statute of limitations is a final adjudication on the merits and operates as a final judgment on the merits for purposes of res judicata." (Emphasis added).

The decision of the Illinois Supreme Court in *Rein v. Noyes and Co.*, is consistent with *Harding Co. v. Harding*, 352 Ill. 417, 426 [4], 186 N.E. 152 (Ill. 1933), which has never been reversed.

Relph v. Board of Education and *Ballweg v. City of Springfield* are factually distinguishable. Neither case involved an attempt by a losing party to re-litigate the same claims and issues that it just lost against the same opposing party, while appealing the adverse decision from the first case.

Neither the Connecticut District Court, nor the Second Circuit Court of

Appeals nor DAI in its Brief in Opposition before this court have discussed *Harding Co. v. Harding* or the Illinois Statute which would bar DAI from re-filing, in Illinois, another lawsuit raising the same claims that were decided adversely to it in the nine prior decisions holding the arbitration clauses void and unenforceable. See 735 ILCS §5/2-619(a)(3) and (b).

The Illinois Petitioners have been denied the full faith and credit required by 28 U.S.C. § 1738 for their prior Illinois State Court judgments holding the arbitration clauses void and unenforceable because of a misinterpretation of Illinois law by DAI, the Connecticut District Court and the Second Circuit Court of Appeals.

(2) In the alternative, the *Rooker-Feldman Doctrine* denies subject matter

jurisdiction to DAI's federal court Petitions to Compel Arbitration since the state courts of Illinois and North Carolina have entered prior judgments holding the arbitration clauses void and unenforceable.

The Connecticut District Court Petition to Compel Arbitration against Michael Johnson, the North Carolina franchisee, was not filed until May, 1994. At that time Michael Johnson's state court lawsuit had been pending in North Carolina for more than one year and the North Carolina trial court had entered appealable orders denying DAI's Motion to Stay that litigation under 9 U.S.C. §3 and denying DAI's Motion to Dismiss that lawsuit. Contemporaneously with filing the Connecticut federal court Petition to Compel Arbitration against Michael Johnson, DAI filed its Notice of

Appeal to the North Carolina Court of Appeals.

In five of the first six Illinois state court cases, DAI filed Motions to Stay those lawsuits under 9 U.S.C. §3, then withdrew those motions before the state court could rule, in favor of filing its Petitions to Compel Arbitration in the Connecticut District Court under 9 U.S.C. §4.

In all of the Illinois cases at issue here, the Illinois trial court entered final trial court judgments holding the arbitration clauses void and unenforceable before the Connecticut District Court entered orders compelling arbitration.

The *Rooker-Feldman Doctrine* is based upon *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L.ed. 362 (1923) and *District of Columbia Court of*

Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.ed. 2d 206 (1983) which bar litigants from filing federal court collateral attacks on state court civil judgments even where the state court judgments could be collaterally attacked in state court proceedings. *Gash Associates v. Village of Rosemont, Ill.*, 995 F. 2d 726, 727 [1-3] (7th Cir. 1993).

Gash Associates v. Village of Rosemont, 995 F. 2d 726, 728 [4-5] (7th Cir. 1993) held that the *Rooker-Feldman Doctrine*, in contrast to the full faith and credit statute, does not require that the prior state court judgment have preclusive effect under state law, stating that the Doctrine:

> " * * * rests on the principle that district courts have only original jurisdiction; the full appellate jurisdiction over judgments of state courts in civil cases lies in the Supreme Court of the United States, and parties have only a short time

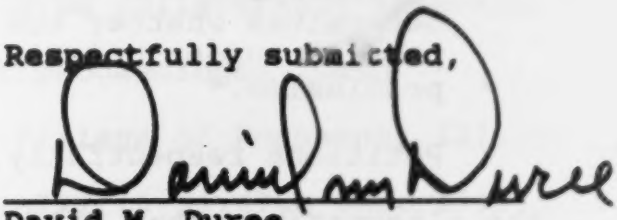
> to invoke that jurisdiction. The *Rooker-Feldman* Doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion."

Petitions respectfully submit, in the alternative, that DAI's continued prosecution of the Connecticut District Court Petitions to Compel Arbitration, after adverse state court judgments holding the arbitration clauses void and unenforceable, can only have the effect of setting aside, or rendering moot, the adverse state court judgments, and therefore such continued prosecution of the federal court Petitions to Compel Arbitration is barred by the *Rooker-Feldman Doctrine*.

CONCLUSION

For one or more of the reasons set forth in the Petition for a Writ of Certiorari, or in this Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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